

NIGHT BOX  
UNITED STATES DISTRICT COURT FILED  
SOUTHERN DISTRICT OF FLORIDA  
FEB 11 2002  
MIAMI DIVISION

CLARENCE M. ALBROOKS  
CLERK, USDC / SD FLA / MIAMI

DONALD JOSEPH LANDRY,

Plaintiff,

v.

EXPRESS ONE INTERNATIONAL, INC.,

Defendant.

CASE NO. 02-20386-CIV-  
MIDDLEBROOKS

Magistrate Judge Bandstra

**DEFENDANT'S MOTION TO STRIKE  
PLAINTIFF'S DEMAND FOR LIQUIDATED DAMAGES  
AND JURY TRIAL UNDER THE WHISTLE BLOWER STATUTE**

Defendant, EXPRESS ONE INTERNATIONAL (hereinafter "Defendant"), by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 12(f), hereby serves its Motion to Strike Plaintiff's Demand for Liquidated Damages and for a Jury Trial pursuant to Florida's private Whistle Blower statute, Fla. Stat. §§ 448.101, et seq., and in support thereof respectfully states as follows:

1. Plaintiff's Complaint asserts one claim under Florida Whistle Blower's Act. Fla. Stat. §448.102(3). In the Complaint, Plaintiff makes a demand for liquidated damages. The statute, however, does not provide for either liquidated or punitive damages. See Fla. Stat. § 448.103(2).
2. The Complaint also makes a demand for trial by jury. This demand should also be stricken because the statute does not afford a right to a jury trial. Fla. Stat. §448.103(2)(“In any action brought pursuant to subsection (1), the court may order relief as follows...”)(emphasis added).

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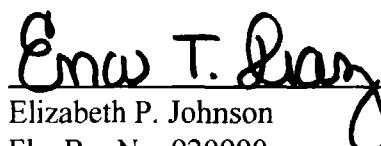
CASE NO. 02-20386

Under the plain terms of the statute, there is no provision for a trial by jury. Other Florida trial courts have agreed. *See Thia Lomax, et.al v. Correctional Services Corp., et.al*, In the Circuit Court for the Tenth Judicial Circuit, In and For Polk County, Florida, Case No. G00-1372-04 (motion to strike jury demand granted); *Brente a. Bevitori v. Kash N' Karry Food Stores, Inc.*, In the Circuit Court for the Twelfth Judicial Circuit In and For Sarasota County, Case No. 20007282-CA-DIV-A (Motion to Strike jury demand granted). A copy of these Orders is attached hereto as Exhibit A.

3. In contrast, the Florida Civil Rights Act. Fla. Stat. §760.01, *et. seq.*, clearly contains language that provides for a trial by jury. Fla. Stat. § 760.11(5). The Florida legislature did not make a similar provision when it enacted the Whistle-blower statute in 1991. Fla. Stat. §440.103(2).

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Court grant Defendant's Motion to Strike Plaintiff's Demand for Liquidated Damages and for a Jury Trial.

Respectfully submitted,

  
Elizabeth P. Johnson

Fla. Bar No. 920990

Ena T. Diaz

Fla. Bar No. 0090999

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Telephone: (305) 789-9200  
Facsimile: (305) 789-9201

CASE NO. 02-20386

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this  
8<sup>th</sup> day of February, 2002 to Martin E. Leach, Esq., Feiler & Leach, 901 Ponce de Leon Blvd., PH  
Suite, Coral Gables, FL 33134.

Ena T. Diaz  
Ena T. Diaz

PWZ Copy

IN THE CIRCUIT COURT FOR THE TWELTH JUDICIAL CIRCUIT  
IN AND FOR SARASOTA COUNTY, FLORIDA

BRENTE A. BEVITORI,

Plaintiff,

v.

Case No. 20007282-CA-DIV-A

KASH N' KARRY FOOD STORES, INC.

Defendant.

ORDER

THIS CAUSE came on for hearing before the Court on August 21, 2000 on defendant's motion to dismiss count III, or in the alternative, to strike the jury trial demand and the Court, having considered the same, the arguments of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED that defendant's motion to dismiss is DENIED and defendant's motion to strike plaintiff's jury trial demand is hereby GRANTED.

While the Court is aware of a number of cases in which claims under the Florida Whistleblower Act, §448.101 *et seq.*, *Florida Statutes*, have been tried to a jury, it does not appear that the issue of whether the Act affords a right to a jury trial was raised in those cases.

Article I, Section 22 of the Florida Constitution guarantees the right to a jury trial "in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845." *In Re: Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433, 434 (Fla. 1986). The specific cause of action need not have existed at the time 1845 Constitution was adopted; however, the cause of action must be of a "like nature." *Id.* at 435. The Florida Whistleblower Act was created by the Florida Legislature in 1991 to protect whistleblowing employees from

EXHIBIT

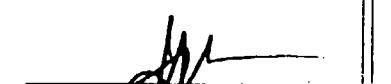
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retaliatory discharge. There was no cause of action for retaliatory discharge at the time Florida adopted its first constitution. *See McElrath v. Burley*, 707 So.2d 836 (Fla. 1st ICA 1998).

Moreover, Section 448.103(2), *Florida Statutes*, provides: "In any action brought pursuant to subsection (1), the *court* may order relief as follows: . . ." (*Emphasis supplied*). There is a presumption that the Florida Legislature knows the meaning of the words employed in each statute and that the words properly express legislative intent. *Alexdex Corp. v. Nachon Enterprises, Inc.*, 641 So.2d 858, 861 (Fla. 1994). In enacting statutes creating similar causes of action for retaliatory discharge, the Florida Legislature has expressly granted the right to a jury trial. *See, e.g. Florida Civil Rights Act of 1992, Section 760.11(5), Florida Statutes*. Therefore, it must be presumed that there is significance to the Legislature's use of the word "court" in the Florida Whistleblower Act.

DONE AND ORDERED in Chambers at Sarasota County, Florida this 1 day of

Sept, 2000.

  
CIRCUIT JUDGE

Copies furnished to:  
Counsel of Record

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT, IN AND  
FOR POLK COUNTY, FLORIDA

THIA LOMAX, et al,

Plaintiffs,

v.

Case No. GOO-1372-04

CORRECTIONAL SERVICES CORP., et al,

Defendants.

ORDER

THIS CAUSE came on for hearing before the Court on August 7, 2000 on defendants' motion to strike plaintiffs' jury trial demand and the Court, having considered the same, the arguments of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED that defendants' motion to strike plaintiffs' jury trial demand is hereby GRANTED. While the Court is aware of a number of cases in which claims under the Florida Whistleblower Act, §448.101 *et seq.*, *Florida Statutes*, have been tried to a jury, it does not appear that the issue of whether the Act affords a right to a jury trial was raised in those cases. Thus, the issue presented by defendants' motion appears to be one of first impression.

Article I, Section 22 of the Florida Constitution guarantees the right to a jury trial "in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845." *In Re: Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433, 434 (Fla. 1986). The specific cause of action need not have existed at the time 1845 Constitution was adopted; however, the cause of action must be of a "like nature." *Id.* at 435. The Florida Whistleblower Act was created by the Florida Legislature in 1991 to protect whistleblowing employees from retaliatory discharge. There was no cause of action for retaliatory discharge at the time Florida adopted its first constitution. See *McElrath v. Burley*, 707 So.2d 836 (Fla. 1<sup>st</sup> DCA 1998).

Moreover, Section 448.103(2), *Florida Statutes*, provides: "In any action brought pursuant to subsection (1), the *court* may order relief as follows: . . ." (*Emphasis supplied*). There is a presumption that the Florida Legislature knows the meaning of the words employed in each statute and that the words properly express legislative intent. *Alexdex Corp. v. Nachon Enterprises, Inc.*, 641 So.2d 858, 861 (Fla. 1994). In enacting statutes creating similar causes of action for retaliatory discharge, the Florida Legislature has expressly granted the right to a jury trial. See, e.g. *Florida Civil Rights Act of 1992, Section 760.11(5)*, *Florida Statutes*. Therefore, it must be presumed that there is significance to the Legislature's use of the word "court" in the Florida Whistleblower Act.

There is a secondary basis for granting defendants' motion to strike. Under Rule 1.430(b), Fla.R.Civ.P., a jury trial must be demanded within ten days after service of the last pleading directed to the issue. The plaintiffs' original pleading in this case was styled "Complaint and Demand for Jury Trial" and contained with an express demand for a jury trial. Subsequently, in response to defendants' motion to dismiss, plaintiffs filed their First Amended Complaint. The plaintiffs' First Amended Complaint omitted any reference to a jury trial, either in its title or in the body of the pleading. See *Arthur v. Hillsborough County Bd. Of Criminal Justice*, 588 So.2d 236, 237 (Fla. 2<sup>nd</sup> DCA 1991) (an original pleading is superseded by an amended pleadings to the extent that the latter does not indicate to preserve a portion of the original pleading). Defendants' Answer and Affirmative Defenses to First Amended Complaint was served on July 18, 2000. On July 31, 2000, the plaintiff served both their Reply to Affirmative Defenses and their Notice and Demand for Jury Trial. However, since plaintiffs' Reply only denies defendants' affirmative defenses, it is not a proper pleading. See *Buss Aluminum Products, Inc. v. Crown Window Co.*, 651 So.2d 694, 695 (Fla. 2<sup>nd</sup> DCA 1995) ("[f]or all practical purposes, a document entitled 'reply' which does not contain any additional facts in the nature of an avoidance is not a pleading"). Accordingly, since the plaintiffs did not

demand a jury trial within ten days after service of the last pleading directed to the issue, even if the Florida Whistleblower Act had afforded the right to a jury trial, that right would have been waived.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida this 14<sup>th</sup> day of

Aug., 2000.

/s/ Dick Prince  
CIRCUIT JUDGE

Copies furnished to:  
Counsel of Record